Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

FIRST PACIFIC BANK and FIRST PACIFIC BANCORP, INC.,

Petitioners,

v.

JAMES E. GILLERAN, SUPERINTENDENT OF BANKS, CALIFORNIA STATE BANKING DEPARTMENT, and FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals erred in holding that the judicial review proceedings under Cal. Fin. Code § 3101, which provides for a trial court "hearing" to determine "the facts upon the merits" concerning the legality of a state seizure of a banking institution, can be limited consistent with the commands of the Due Process Clause to summary judgment procedures conducted without any discovery by the seized institution and only upon the administrative record prepared by the state without any administrative hearing.

LIST OF PARTIES

Plaintiffs-Appellants below were First Pacific Bank, a California-chartered bank, and First Pacific Bancorp, Inc., as controlling shareholder of First Pacific Bank. Defendants-Appellees were James E. Gilleran, the California Superintendent of Banks, the California State Banking Department, and the Federal Deposit Insurance Corporation.

Pursuant to Supreme Court Rule 29.1, First Pacific Bancorp, Inc. is identified as the parent of First Pacific Bank. Neither First Pacific Bank nor First Pacific Bancorp, Inc. has subsidiaries other than those wholly owned.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, First Pacific Bank and First Pacific Bancorp, Inc., respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 40 F.3d 1023 (9th Cir. 1994), and is included in the Appendix at pp. 1a-14a. The order of the court of appeals denying

rehearing is included in the Appendix at pp. 36a-37a. The decisions of the district court denying the motion for summary judgment and granting the renewed motion for summary judgment are unreported and are included in the Appendix at pp. 15a-27a and 28a-35a, respectively.

JURISDICTION

The judgment of the court of appeals was entered on November 21, 1994. Rehearing was denied on January 12, 1995. On April 5, 1995, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including May 12, 1995. This Court has jurisdiction under 28 U.S.C. § 1254(1). Jurisdiction in the court of appeals was based upon 28 U.S.C. § 1291, and in the district court upon 12 U.S.C. § 1819(b)(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, that –

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

U.S. Const. amend. XIV.

The Fifth Amendment to the United States Constitution provides, in pertinent part, that –

> No person shall be . . . deprived of life, liberty, or property without due process of law; nor

> shall private property be taken for public use, without just compensation.

U.S. Const. amend V.

Section 3100 of the California Financial Code, Cal. Fin. Code § 3100, provides, in pertinent part:

> Whenever it appears to the superintendent that:
>
> (a) The contributed capital of any bank is impaired;
>
> * * *
>
> the superintendent may forthwith take possession of the property and business of such bank and retain possession until such bank resumes business or its affairs be finally liquidated as herein provided. Such bank, with the consent of the superintendent, may resume business upon such conditions as he may prescribe.

Section 3101 of the California Financial Code, Cal. Fin. Code § 3101, provides:

> Whenever the superintendent has taken possession of the property and business of any bank, such bank, within 10 days after such taking, if it deems itself aggrieved thereby, may apply to the superior court in the county in which the head office of such bank is located to enjoin further proceedings. The court, after citing the superintendent to show cause why further proceedings should not be enjoined and after a hearing and a determination of the facts upon the merits may dismiss such application or enjoin the superintendent from further proceedings and direct him to surrender the property and business to such bank.

STATEMENT AND INTRODUCTION OF THE CASE

This case arises out of the California state government's seizure of a bank. Petitioners First Pacific Bank (the "Bank") and First Pacific Bancorp, Inc., the Bank's holding company, brought the action in state court pursuant to Cal. Fin. Code § 3101 after the Bank was seized by James Gilleran, the California Superintendent of Banks and the head of the California State Banking Department (collectively, the "State"). The State appointed the Federal Deposit Insurance Corporation ("FDIC") as receiver for the Bank. The State's seizure decision was made *ex parte* and without prior notice or hearing of any kind. The Bank's court action for review of the seizure was thus the first opportunity for a hearing it had ever had on this issue before any tribunal – either before or after the regulatory takeover. This hearing, however, was rendered meaningless by the summary procedures urged by the State, adopted by the district court, and upheld by the Ninth Circuit.

The State had resisted all discovery in the matter and responded to the complaint by moving for summary judgment on the ground that certain interim unadjusted financial statements of the Bank purportedly established that the Bank's contributed capital was impaired under California law. The district court ultimately granted the motion without permitting any discovery by the Bank. Thus, the Bank was afforded no opportunity to review requested documents, or to take testimony from and cross-examine the State's witnesses, and was forced to make its response to the seizure based on whatever information it could glean from the State's "administrative

record," a record prepared solely by the State without the benefit of any adversarial or even administrative proceedings in which the Bank was involved.

Significantly, a similar federal statute has been applied in an inconsistent manner with respect to the due process questions raised in this petition, thus raising a serious national issue concerning the scope of due process protection applicable to seizures of financial institutions. The Ninth Circuit's ruling allows government agencies to seize financial institutions without notice of any kind and without even any post-seizure proceedings that permit adequate protections to ensure a lawful seizure. This ruling does violence to the procedural due process rights of the financial institution and its owners and cannot be squared with the decisions of this Court.

A. Factual Background And Proceedings Before The District Court

First Pacific Bank was a state-chartered bank with over $100 million in assets. On August 10, 1990, without any prior notice or opportunity for the Bank to be heard, the State seized the Bank pursuant to Cal. Fin. Code § 3100. Section 3100 provides that "[w]henever it appears to the superintendent that . . . [t]he contributed capital of any bank is impaired . . . the superintendent may forthwith take possession of the property and business of such bank." The State's "Order Taking Possession of Property and Business" recited a finding that, among other things, "[t]he contributed capital of the Bank is impaired." As support for this finding, the order attached a "Consolidated Balance Sheet as of July 31, 1990," which purported

to show that, based on the Bank's books, the contributed capital of the Bank was impaired and when certain state-mandated write-downs of the Bank's assets were taken, an even greater impairment was shown.

In accordance with the provisions of Cal. Fin. Code § 3101, the Bank and its owners brought an action to reverse the seizure. Section 3101 provides that, within ten days of seizure, a bank may apply to a court to enjoin further proceedings by the State. The court, "after a hearing and a determination of the facts upon the merits[,] may dismiss such application or enjoin the superintendent from further proceedings and direct him to surrender the property and business to such bank." Cal. Fin. Code § 3101. The Bank alleged that its contributed capital was not impaired and that the State's write-downs were improper and without basis in fact, thus the seizure was unjustified.[1]

The State moved for summary judgment on the narrow ground that its seizure should be upheld because the Bank's own financial statements showed that the Bank's

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[1] The Bank concurrently moved pursuant to § 3101 for an order to show cause why an immediate injunction should not enter. That motion was ultimately deferred. The Bank later moved to stay the liquidation of the Bank pending the outcome of this action challenging its seizure, and filed an amended complaint joining the FDIC, which was liquidating the Bank as the State's receiver, as a defendant (this joinder resulted in the removal of the case to federal district court). Because the district court chose to act first on the State's summary judgment motion, the motion for a stay of liquidation was never ruled and was rendered moot when summary judgment was granted. *See* App. at 34a n.6.

contributed capital was impaired pursuant to a California statute.[2] Cal. Fin. Code § 134 provides that "contributed capital" means "all of shareholders' equity other than retained earnings," *id.* § 134(a), and "the contributed capital of a bank shall be deemed to be impaired whenever such bank has deficit retained earnings in an amount exceeding 40 percent of such contributed capital," *id.* § 134(b). Citing those provisions, the State submitted a declaration from a bank examiner to support its motion. The examiner's declaration purported to demonstrate how the Bank's consolidated balance sheet as of July 31, 1990, daily statement of condition as of August 8, 1990, and daily statement of condition as of August 10, 1990 (the seizure date, thus the statement was provided to the State by FDIC), each showed an impairment of contributed capital under the "forty percent test" of § 134(b).

The Bank had previously served the State with its initial discovery requests, including a request for production of documents, a request for admissions, and a set of interrogatories. The Bank also noticed several depositions, including those of each person who would eventually serve as a declaration witness in support of the State's renewed summary judgment motion. The State objected to each and every one of these discovery requests on the ground that it was not subject to discovery and the court should not consider any evidence outside the State's administrative record. The State provided

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[2] Thus, the validity of the other grounds for the seizure contained in the State's order, and of the capital write-downs set forth in that order, although challenged by the Bank, were not placed at issue.

the court and the Bank with this so-called "administrative record," consisting of documents from the State's files concerning the Bank. The record was unilaterally compiled by the State itself, which withheld a number of documents on various untested claims of privilege, and without the benefit of any hearings or review by a neutral fact finder.

In other words, the Bank's seizure was to be evaluated on the basis of the State's submission to the court, and the Bank – now deprived of access to its own books and records because of the seizure – was left to rely on whatever submissions it might by chance have submitted before the State's *ex parte* seizure. The Bank sought, through a motion for discovery, to compel responses to its discovery requests. This discovery motion and the State's summary judgment motion were filed on the same day (in state court prior to removal). The district court chose to give plenary consideration to the State's summary judgment motion without any discovery, and the discovery motion was never ruled. App. at 34a n.6. This procedure was utilized by the district court even though the declarations submitted by the State in support of its summary judgment motion were not part of the so-called "administrative record."

Notwithstanding the material disadvantage imposed by the lack of discovery or even access to its own records now under control of the FDIC, the Bank attempted to mount a response to the State's summary judgment motion by submitting declarations from its former controller, its chairman, and several independent certified public accountants. Nevertheless, the Bank's evidence

refuted the State's position and, at a minimum, demonstrated that there were genuine factual issues regarding whether the Bank's contributed capital was impaired. In particular, the evidence showed that the State's analysis and application of the statutory test had not considered:

(i) a capital note to the Bank's holding company was contributed capital;[3]

(ii) certain adjustments necessary to make the Bank's interim unadjusted financial statements, relied on by the State, fairly presented in accordance with generally accepted accounting principles – the statutory standard[4] – and normal banking practices reduced deficit retained earnings at the date of seizure;[5] and

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[3] Declaration evidence from the Bank's former chairman (who remained as chairman of the holding company) showed that the State itself had earlier directed that the Note should be included in capital. In a letter to the Bank, the State had indicated that "the capital note may now be included in capital for all purposes . . . . we did consider the contribution in evaluating the bank's capital adequacy."

[4] Cal. Fin. Code § 118(a) requires that retained earnings, shareholders' equity, and similar accounting items of a bank must be "prepared or determined in conformity with generally accepted accounting principles then applicable, fairly presenting in conformity with generally accepted accounting principles the matters which they purport to present."

[5] The Bank financial statements relied upon by the State to conclude that the Bank's capital was impaired were "interim, unadjusted" statements. According to the Bank's former controller with responsibility for its financial statements, these interim, unadjusted statements "were only for internal use" and "provide insufficient information from which to conclude or determine that the capital or shareholders equity of [the Bank]

(iii) a reserve for loan losses and an amount for loan fees collected by the Bank but deferred on its books should be deducted from deficit retained earnings to portray accurately the capital in the Bank at the date of seizure.[6]

When some of these additional facts were considered, forty percent of the Bank's contributed capital *exceeded* deficit retained earnings, thus there was no impairment under the statute.

The district court denied the State's summary judgment motion in an order filed May 15, 1991. App. at 15a-27a. The court stated that "[t]he real issue raised by defendants' motion is this: does a factual dispute exist as to whether contributed capital was impaired on the date that defendant banking superintendent seized plaintiffs' business and assets?" App. at 17a. In applying the statutory impairment test, the court found in favor of the Bank

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was impaired." It was the regular practice of the Bank to prepare adjusted quarterly statements, which accurately depicted the financial position of the Bank. Such adjustments are made in the ordinary course of business and are necessary to state the financial statements in accordance with generally accepted accounting principles.

[6] The evidence showed that the State itself had earlier considered loan loss reserves in applying the forty percent capital impairment test of Cal. Fin. Code § 134(b). In a document contained in the State's administrative record, one of the State's witnesses on the summary judgment motion had applied the forty percent test only after reducing deficit retained earnings by the amount of loan loss reserves, which was consistent with the Bank's position.

that "the capital note should be included in the computation of contributed capital." *Id.* at 21a. The court also found, as the Bank had urged, that "formal accounting adjustments to the Bank's internal trial balances should have been considered by the defendants in their computation of impairment of contributed capital. Fundamental fairness requires that an act as serious as a seizure of a bank's assets and business must not be done on the basis of inaccurate or incomplete information." *Id.* at 25a-26a. According to the court, "a genuine issue of material fact exists as to [the] nature and amount of the adjustments to retained earnings" and "the Court must insist on precision in this computation in view of the extremely small margin of error." *Id.* at 26a. Although the court found further that "allowance for loan losses is not an item appropriately included in the computation of contributed capital," *id.* at 24a, the Bank's capital was not impaired under the court's analysis because of the inclusion of the capital note in contributed capital and the adjustments which reduced deficit retained earnings. *Id.* at 25a n.7. In summary, the district court concluded:

> [I]n view of the Court's determinations that the capital notes may be included in the computation of contributed capital of the bank and that a genuine issue of fact exists as to the amount of the required adjustments to the bank's retained earnings, the Court finds that a genuine issue of material fact exists as to whether contributed capital was impaired on the date of the superintendent's action. Therefore, defendants [sic] motion for summary judgment must be denied.

Id. at 26a. The court noted that its denial of the motion was "without prejudice" and that supplementation of the

materials provided to the court could perhaps absolutely resolve the impairment issue raised by the motion. *Id.*

Seizing upon the court's denial "without prejudice," the State renewed its summary judgment motion. The renewed motion continued to urge that the Bank's own financial statements (as modified by the prior district court ruling) showed a capital impairment, and was accompanied by a new declaration, from yet another bank examiner, which again was never part of the State's administrative record. The sole issue raised by the renewed motion was the amount of the adjustments which reduced deficit retained earnings. The declaration witness claimed to have discovered a discrepancy in one of those adjustments in a declaration submitted by the Bank. Under the State's view, deficit retained earnings were increased to an amount that exceeded 40% of contributed capital by $40,816. The Bank responded to the State's renewed motion with a further declaration from its controller defending his computations, and a further exchange of declarations occurred.

Despite the material factual conflicts in the various declarations, the district court granted the State's renewed motion and entered an order on July 12, 1991. App. at 28a-35a. The court found that the State's declaration witness "appears correct in his contention" concerning the amount of the adjustments which reduced deficit retained earnings. *Id.* at 30a. As a consequence, the court found "no genuine issue of material fact remains as to the proper adjustment." *Id.* at 33a. The result of the district court's resolution of that factual issue was to uphold the seizure of a $100 million bank based on an alleged discrepancy of some $40,000. Conceding that "it may seem

inequitable to grant summary judgment on the basis of a seemingly technical accounting issue," the district court granted summary judgment for the State. *Id.* at 34a.

B. The Court of Appeals' Ruling

The court of appeals affirmed the district court's grant of summary judgment, "but for reasons different than those stated by the district court." App. at 5a. The panel rejected the district court's conclusion, subject to review on a cross-appeal by the State, that the Bank's capital note should be considered contributed capital. *Id.* at 9a-12a. The panel concurred with the district court's refusal to allow deficit retained earnings to be reduced by the amount of the Bank's loan loss reserves. *Id.* at 8a-9a. As a consequence of these findings, the panel did not reach the issue of necessary adjustments to the financial statements – which it observed had "prompted a series of dueling affidavits in the district court" – because the amounts involved would not avert the impairment of contributed capital. *Id.* at 12a.

The panel also dismissed the Bank's arguments concerning the lack of discovery and denial of due process. The panel stated that "[t]he State is justified in seizing a bank when the bank's own financial statements demonstrate that its contributed capital is impaired. When, as in this case, the State has relied on the Bank's own financial statements without making any adjustments, the Bank will be hard pressed to show the relevance of any discovery beyond its own records and the State's administrative

record." *Id.* at 13a. Finding that the district court's summary judgment procedures for judicial review of the seizure did not violate due process, the panel stated "[a]s it was, the Bank was given the opportunity to present evidence. The district court then properly entered summary judgment on the merits." *Id.* at 14a.

REASONS FOR GRANTING THE PETITION

The holding of the Ninth Circuit confers extraordinary authority upon government agencies to seize property belonging to private individuals without ever having to justify the action on the merits. No one quarrels that the government must have authority to act quickly and decisively whenever a financial institution poses a serious risk. But the government's compelling interest in preventing loss through immediate action dissolves once the institution has been seized from private hands. At that point, fundamental fairness requires that the individual whose property has been confiscated be given a full and fair opportunity to prove on the merits that the action of the regulator was unlawful or arbitrary because it lacked a factual basis or was based on false assumptions.

The court of appeals denies the private parties any meaningful opportunity to be heard at any time. Instead of allowing complainants a fair hearing in which to explain to the court why the government's decision to seize the institution was unlawful, the court of appeals' ruling requires complainants to make a blind response to

an early summary judgment motion, without any opportunity for discovery and solely on the basis of the agency's specially prepared and selected record. This is an impossible burden, and it is a process that eviscerates the state statutory right to challenge the seizure "upon the merits" and renders the Due Process Clause a dead letter.

In these circumstances, it is easy to understand why numerous courts have found the need for a meaningful post-seizure hearing in which challenging parties are given an opportunity to shape the record with their own submissions and to challenge the government's factual claims through cross-examination. *See infra* pp. 17-18. This divergence of judicial opinion on an issue that is fundamental to the regulation of the financial institutions industry warrants review by this Court. This case presents a perfect vehicle for addressing the question of applicable due process protections upon the government seizure of a financial institution.

1. This case is essentially an action for judicial review of the Bank's seizure, brought pursuant to a special state statute that provides for such review. Cal. Fin. Code § 3101. This judicial review statute provides that the court, *"after a hearing* and a determination of the facts *upon the merits*[,] may dismiss such application or enjoin the superintendent from further proceedings and direct him to surrender the property and business to such bank." *Id.* (emphasis added). The *ex parte* seizure in this case was not preceded by any formal administrative proceedings that afforded the Bank a hearing before a neutral finder of fact on the issues that lead to the seizure. Rather, the only hearing the Bank will ever get on those

issues is in this court action pursuant to the judicial review statute. That hearing, however, was rendered meaningless by the district court's grant of summary judgment and the court of appeals' affirmance. The procedure sanctioned by the courts below – early disposition of complex issues on summary judgment without any opportunity for discovery – is inconsistent with the most fundamental elements of due process.

Something more than a summary disposition without discovery is required to fulfill the requirements of due process. Indeed, the language of the state statute itself strongly implies that seized banks are entitled to evidentiary hearings and that the trial court must enter factual findings either upholding the seizure or striking it down. Such a hearing would, of course, be meaningless without an opportunity for discovery. Any other approach would give little assurance that the undeniable property rights of an institution's owners are protected. Even the district court noted the "extremely small margin of error" involved here, App. at 26a, and the seeming inequity of disposing of the case on a "technical" issue, App. at 34a, but it nonetheless summarily terminated the Bank's review rights based on such a narrow view.[7]

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[7] The district court found that the law "only" required the court to hold a hearing and determine the facts, and that it had fulfilled those requirements by holding a hearing on the summary judgment motion and determining facts based on the declarations. App. at 34a n.7. Perhaps the court's momentary hearing, recorded in a six-page transcript, and findings based upon a flurry of affidavits without any discovery comply with some formalistic notion of process, but they were devoid of the substance required by the Due Process Clause.

2. Notably, the federal statutes providing for *ex parte* seizures of financial institutions also contain provisions for judicial review by an action in district court "upon the merits," although without the explicit requirement of a "determination of the facts" contained in the state statute here. *See* 12 U.S.C. § 1464(d)(2)(B) (formerly codified at 12 U.S.C. § 1464(d)(2)(E) and 12 U.S.C. § 1464(d)(6)(a)) (savings and loan associations);[8] 12 U.S.C. § 1821(c)(7) (banks). Considerable confusion exists among the courts concerning the scope of judicial review under these statutes and related due process implications. A host of district courts applying the statute for savings and loan associations have concluded that seized institutions are entitled to an evidentiary hearing, thus rejecting the kind of attenuated proceedings adopted here. *See, e.g., Marietta Franklin Sec. Co. v. Muldoon*, 770 F. Supp. 1212, 1220-21 (S.D. Ohio 1991) ("[a]fter a thorough review of the multitude of cases concerning the role of court review permitted within this area . . . the Court feels that the parties should be able to supplement the Administrative Record"), *appeal dismissed*, 972 F.2d 128 (6th Cir. 1992); *Lincoln Sav. & Loan Ass'n v. Wall*, 743 F. Supp. 901, 904 n.3, (D.D.C. 1990) (due process and the statute require the court to undertake a level of inquiry beyond a simple review of the government's record; court held a "wide

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[8] Under the Home Owners' Loan Act of 1933, this judicial review provision was originally designated § 1464(d)(6)(a). The Financial Institutions Reform, Recovery and Enforcement Act of 1989 redesignated the provision as § 1464(d)(2)(E). The Comprehensive Deposit Insurance Reform and Taxpayer Protection Act of 1991 again redesignated the provision, as § 1464(d)(2)(B).

ranging" evidentiary hearing during which oral testimony and documentary evidence were received); *Collie v. FHLBB*, 642 F. Supp. 1147, 1149-52 (N.D. Ill. 1986) (institution must have "a meaningful opportunity to make a case in opposition to the appointment . . . . [i]f it has not, then the court should provide that opportunity"); *San Marino Sav. & Loan Ass'n v. FHLBB*, 605 F. Supp. 502, 508 (C.D. Cal. 1984) (court permitted trial on issue that led to seizure); *Fidelity Sav. & Loan Ass'n v. FHLBB*, 540 F. Supp. 1374, 1377 (N.D. Cal.) (reviewing court may go beyond government record and review action *de novo*), *rev'd on other grounds*, 689 F.2d 803 (9th Cir. 1982), *cert. denied*, 461 U.S. 914 (1983); *Telegraph Sav. & Loan Ass'n v. FSLIC*, 564 F. Supp. 862, 869-71, 875 (N.D. Ill. 1981) (denying summary judgment and holding that seized institution "must be accorded a full opportunity to present evidence and cross examine witnesses on the issue of whether the [government's] conduct met the statutory requirements"), *aff'd*, 703 F.2d 1019 (7th Cir.), *cert. denied*, 464 U.S. 992 (1983).

On the other hand, two court of appeals decisions have taken a narrower view, although without confronting the due process issue presented here. In *Guaranty Savings & Loan Association v. FHLBB*, 794 F.2d 1339, 1342 (8th Cir. 1986), and *Franklin Savings Association v. Director, Office of Thrift Supervision*, 934 F.2d 1127 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 1475 (1992), the courts found review restricted to the government's administrative record. The *Guaranty* court did not address the Due Process Clause. In *Franklin*, the court did not review the due process issue because it found that the institution had objected to the lack of a *prior* hearing. 934 F.2d at 1140. This Court found in *Fahey v. Mallonee*, 332 U.S.

245 (1947), that the Constitution did not require an adjudicatory hearing prior to seizure of a financial institution. The issue here, however, concerns the *level of post-deprivation procedures* required to comport with due process when there are no pre-deprivation procedures.

A third court of appeals opinion, *Woods v. FHLBB*, 826 F.2d 1400 (5th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988), explicitly found that the absence of pre-deprivation process in financial institutions seizures heightens the need for post-deprivation procedures. *Id.* at 1411. In that case, the court found due process satisfied when, among other things, there had been a formal administrative cease and desist proceeding which provided the institution a full and fair opportunity to present its case. *Id.* at 1412; *see also Gibraltar Sav. v. Ryan*, 772 F. Supp. 1290, 1295 (D.D.C. 1991) (rejecting contention that due process required heightened post-deprivation procedures).

The Ninth Circuit decision – which severely truncates review of a financial institution seizure – thus exacerbates the continuing confusion and conflict among the courts on this recurring issue implicating significant constitutional concerns.[9] As demonstrated above, the courts have reached different conclusions concerning the process due a seized financial institution.

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[9] Several commentators have highlighted the due process issues presented here. *See* Comment, *Due Process Considerations in The Federal Takeover of Savings and Loan Associations: The Case for a Hybrid Manner of Review*, 40 Kan. L. Rev. 1065 (1992); Note, *Franklin Savings v. Office of Thrift Supervision: A Case of Judicial Interpretation Creating a Due Process Dragon*, 6 B.Y.U.L. Rev. 587 (1992).

3. "A fundamental requirement of due process is 'the opportunity to be heard.' It is an opportunity which must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (citation omitted) (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)). The lower courts in this case, however, held that the Bank's "hearing" should have been no more than review of a paper record compiled without discovery and consisting solely of summary judgment affidavits and items from the State's "administrative record." The court thus adopted a cramped notion of judicial review that denies any meaningful opportunity to be heard.

In cases like this one, where substantial property interests have been confiscated, there is a right to a full measure of process: "The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss.' " *Goldberg v. Kelly*, 397 U.S. 254, 262-63 (1970) (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)).[10] Where pre-deprivation process is denied, due process requirements are satisfied by a "full and immediate" post-deprivation hearing. *Mitchell v. W.T. Grant Co.*,

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[10] The requirements of due process apply to administrative agencies. *See Withrow v. Larkin*, 421 U.S. 35, 46 (1975). Judicial review plays an important role in ensuring fair administrative processes. "[O]ur system of law has always endeavored to prevent even the probability of unfairness." *In re Murchison*, 349 U.S. 133, 136 (1955). "Judicial review must operate to ensure that the administrative process itself will confine and control the exercise of discretion." *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 598 (D.C. Cir. 1971).

416 U.S. 600, 611 (1974); *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 262, 271 (1987). Indeed, in *Woods v. FHLBB*, 826 F.2d 1400, 1411 (5th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988), the Fifth Circuit found that "the absence of pre-deprivation process heightens the need for post-deprivation procedures" in cases involving seizures of financial institutions.

This Court has held that where there is no "initial check against mistaken decisions" and the property interests at stake are substantial, an evidentiary hearing must be held before the government can conclusively terminate a legitimate claim of entitlement. *See Brock*, 481 U.S. at 261, 263 (requiring a complete and expeditious review following minimal notice). Furthermore, "[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg*, 397 U.S. at 269.[11]

This Court's familiar balancing test for determining due process rights requires consideration of three factors:

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[11] "When the agency making the decisions relies on evidence that the claimant has no chance to refute, the hearing becomes infected with a procedure that lacks that fundamental fairness the citizen expects from his government." *United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 720 (1963) (Douglas, J., dissenting); *see also Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring) ("The validity and moral authority of a conclusion largely depend on the mode by which it was reached. Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness.").

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976). Consideration of these factors confirms that due process requires more than the summary adjudication without discovery adopted by the lower courts.

First, the interest of the Bank and its shareholders could not be more significant, for the very livelihood and existence of the Bank are at stake. The appointment of a receiver is the functional equivalent of a corporate "death penalty." It is the most severe enforcement measure available to the State.

Second, it is difficult to conceive of a procedure less likely to provide an accurate adjudication than that adopted here. The procedure adopted here is fundamentally at odds with core principles of due process: (1) review is confined solely to a paper record without any evidentiary hearing, discovery, or cross-examination, a strongly disfavored practice;[12] (2) the State's administrative record is not compiled and acted upon in the first

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[12] *See Califano v. Yamasaki*, 442 U.S. 682, 696 (1979); *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970); *Londoner v. City of Denver*, 210 U.S. 373, 386 (1908); *Gray Panthers v. Schweiker*, 652 F.2d 146, 158 (D.C. Cir. 1980). As this Court has noted in another context, a grant of summary judgment should occur only "after adequate

instance by a neutral decisionmaker, rather the State alone prepares it and submits it with the contention that it is the only evidence the reviewing court may consider;[13] and (3) the State's administrative record (which it cited as the basis for refusing to submit to discovery) is prepared and compiled essentially in secret and without the knowledge of the institution, as a function of the *ex parte* nature of the seizure.[14]

A procedure of this type bears serious risk of permitting erroneous seizures. The seized institution, already deprived of its resources, employees, and records, is largely precluded from presenting probative evidence and is thus left in the impossible position of challenging a decision based on whatever informal submissions it may have provided to the State before the seizure and which the State then chose to include in its record. Procedural safeguards, such as discovery and an evidentiary

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time for discovery." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *see also* Fed. R. Civ. P. 56(f).

[13] *See Ward v. Village of Monroeville*, 409 U.S. 57 (1972); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242-43 & n.2 (1980).

[14] As commentators have noted, "[t]he absence of a formal adjudicatory record justifies . . . a presumption in favor of district court review. Without such record, a judicial trial will very often be necessary to determine either the basis upon which the administrator acted or the facts relevant to an evaluation of his action." Currie & Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 Colum. L. Rev. 1, 57 (1975).

hearing,[15] would substantially increase the degree of assurance that the State's discretion is not being abused.

Finally, the government interest is not harmed by additional procedures. The interest in permitting the State to take prompt action, *see Fahey*, 332 U.S. at 253, is not burdened by providing additional procedures *after* the State takes that action. Once the institution is under government control, there is no legitimate interest in so severely constraining the review procedure.

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[15] The Ninth Circuit's suggestion that the Bank was delinquent in failing to seek discovery from the FDIC (as contrasted with the State) misperceives the issue here. When the district court granted summary judgment in this case there was a pending motion to compel discovery from the State. The State had objected to all discovery and opposed the motion on the ground that the only evidence that could be considered by the court was the State's administrative record, a position that effectively made all discovery futile. The district court scheduled the discovery motion for argument, but ultimately concluded that because of its grant of the State's summary judgment motion it "need not reach" the discovery motion. App. at 15a n.1, 27a, 34a n.6. Under these circumstances, the panel's suggestion, App. at 13a-14a, that the Bank should have sought discovery from the FDIC is implausible – the State had already taken the position that such evidence and discovery could not be permitted or even considered in this case, and that was clearly the State's position throughout the litigation. The Bank's discovery motion challenged this position as inconsistent with due process, among other things. Accordingly, any conclusion that the Bank languished in its discovery efforts by failing to seek discovery from FDIC is erroneous – the State was attempting to bar all discovery and the Bank had done all that it could by moving the court to permit discovery.

The summary procedure permitted by the district court and the Ninth Circuit was inconsistent with fundamental principles: "The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decisionmaking when it acts to deprive a person of his possessions . . . . Its purpose . . . is to protect his use and possession of property from arbitrary encroachment – to minimize substantively unfair or mistaken deprivations of property." *Fuentes v. Shevin*, 407 U.S. 67, 80-81 (1972). The Court should grant a writ and review this case because the review provided by the proceedings below was inconsistent with due process in that it denied the Bank a meaningful opportunity to be heard.

* * *

State and federal regulatory authorities wield broad power over financial institutions such as the Bank, and their most severe sanction is the appointment of a receiver to liquidate those private institutions. In recent years, the government has exercised these dramatic powers with greater frequency than ever before in the nation's history. In the normal course of the regulatory process, the issues presented in this case are certain to recur.

This case involves an extreme exercise of government power without adequate procedures to ensure the fairness and accuracy of the government's action. Only this Court can resolve the constitutional issues presented by the review procedure adopted by the lower courts in this case and thereby establish minimum guidelines for judicial review that will guarantee the due process rights of those institutions in the Bank's position.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FIRST PACIFIC BANK; FIRST PACIFIC BANCORP, INC., *Plaintiffs-Appellants,* v. JAMES E. GILLERAN; CALIFORNIA STATE BANKING DEPARTMENT; FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for First Pacific Bank, *Defendants-Appellees.*	No. 91-55890 D.C. No. CV-90-6563-JGD
FIRST PACIFIC BANK; FIRST PACIFIC BANCORP, INC., *Plaintiffs-Appellees,* v. JAMES E. GILLERAN; CALIFORNIA STATE BANKING DEPARTMENT, *Defendants-Appellants.*	No. 91-56081 **OPINION**

Appeals from the United States District Court
for the Central District of California
John G. Davies, District Judge, Presiding

Argued and Submitted
July 15, 1994 – Pasadena, California

Filed November 21, 1994

Before: J. Clifford Wallace, Chief Judge, Stephen Reinhardt, Circuit Judge, and Jack E. Tanner,* District Judge.

Opinion by Chief Judge Wallace

SUMMARY

Banking/FDIC and FSLIC/Government Regulation

The court of appeals affirmed a district court judgment. The court held that for purposes of analyzing whether a bank's contributed capital was impaired, a bank's deficit retained earnings could not be reduced by an amount of loan loss reserves.

The State of California seized control of appellant First Pacific Bank pursuant to California Financial Code § 3100 because, among other things, it concluded that the Bank's contributed capital was impaired. The State appointed appellee the Federal Deposit Insurance Corp. (FDIC) as receiver for the Bank.

The Bank and its owners brought suit to reverse the seizure. The district court entered summary judgment confirming the seizure. The court concluded that the Bank's contributed capital was impaired. The Bank appealed. The State cross-appealed from an earlier ruling that a capital note should be included in the Bank's contributed capital.

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* Honorable Jack E. Tanner, United States District Judge, Western District of Washington, sitting by designation.

[1] Under California Financial Code § 134, contributed capital consists of the bank's shareholders' equity, other than retained earnings. Section 134(b) provides that a bank's contributed capital is impaired when the bank has deficit retained earnings in an amount exceeding 40 percent of its contributed capital. [2] The Code requires that the impairment analysis be performed using figures for contributed capital and retained earnings that would be presented on a balance sheet prepared in accordance with generally accepted accounting principles (GAAP).

[3] In this case, the Bank's figures showed deficit retained earnings which exceeded 40 percent of contributed capital. Thus, according to these figures, the Bank's contributed capital was impaired.

[4] The Bank argued that for purposes of the impairment analysis, its deficit retained earnings should be reduced by an amount of loan loss reserves and an amount in deferred loan fees. However, because the impairment calculation must be performed using contributed capital and deficit retained earnings figures as they would be presented on a balance sheet prepared in accordance with GAAP, these adjustments could not be made. [5] Deficit retained earnings may not be reduced by loan loss reserves.

[6] The language and structure of the California Financial Code indicated that the district court reached an incorrect result when it considered the Bank's capital note as contributed capital. Under the Code, a capital note is considered to be a liability. [7] The capital note

was not a part of shareholders' equity or GAAP contributed capital. A capital note clearly provides a less desirable financial cushion than equity.

[8] Because the Bank failed to seek discovery from the FDIC, the entity that it knew had its records, the district court did not err by entering summary judgment without first ruling on the Bank's motion for discovery.

COUNSEL

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Joseph M. O'Heron, Deputy Attorney General, Los Angeles, California, for the defendants-appellees-cross-appellants.

OPINION

WALLACE, Chief Judge:

On August 10, 1990, the State of California (State) seized control of First Pacific Bank (Bank) pursuant to California Financial Code (Financial Code) § 3100 because, among other things, it concluded that the Bank's contributed capital was impaired. The State appointed the Federal Deposit Insurance Corporation (FDIC) as receiver for the Bank. In accordance with Financial Code § 3101, the Bank and its owners brought suit in state court to reverse the seizure. The FDIC removed the case to federal district court pursuant to 12 U.S.C.

§ 1819(b)(2)(B). The district court entered summary judgment confirming the seizure.

The Bank now appeals from the district court's summary judgment, and its conclusion that its contributed capital was impaired. The State cross-appeals from an earlier ruling that a capital note should be included in the Bank's contributed capital. We have jurisdiction over these timely appeals pursuant to 28 U.S.C. § 1291. We affirm, but for reasons different than those stated by the district court.

I

The Bank argues that summary judgment was improper because there was a genuine issue of material fact as to whether its contributed capital was impaired. We review a summary judgment de novo. *Jones v. Union Pac. R.R.*, 968 F.2d 937, 940 (9th Cir. 1992). Our tasks on appeal are to determine (1) whether there is a genuine issue of material fact when the evidence is viewed in the light most favorable to the nonmoving party, and (2) whether the district court correctly applied the law. *Tzung v. State Farm Fire & Cas. Co.*, 873 F.2d 1338, 1339-40 (9th Cir. 1989). On appeal, we may affirm on any ground supported by the record. *United States v. Washington*, 969 F.2d 752, 755 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1945 (1993).

[1] The starting place for our analysis is Financial Code § 134, which provides the statutory definition of contributed capital and the formula for determining whether a bank's contributed capital is impaired. According to section 134(a), contributed capital consists of "all of

[the Bank's] shareholders' equity other than retained earnings." Section 134(b) provides that the Bank's contributed capital "shall be deemed to be impaired whenever such bank has deficit retained earnings in an amount exceeding 40 percent of such contributed capital."

[2] The Financial Code requires that the impairment analysis be performed using figures for contributed capital and retained earnings that would be presented on a balance sheet prepared in accordance with generally accepted accounting principles (GAAP):

> All references . . . to financial statements, balance sheets . . . and all references to assets, liabilities, earnings, retained earnings, shareholders' equity, and similar accounting items of a bank mean such financial statements or such items prepared or determined in conformity with generally accepted accounting principles then applicable, fairly presenting in conformity with generally accepted accounting principles the matters which they purport to present. . . .

Cal. Fin. Code § 118 (1978).

The State argues that the Bank's own financial statements demonstrate that its contributed capital is impaired, even before they are adjusted to compensate for the overvaluation of the Bank's assets. The record contains at least three sets of calculations that differ in minor amounts because they use figures from three different dates. Each calculation, however, shows that the Bank's contributed capital is impaired. For the sake of simplicity, we will use the figures for August 10, 1990, as found in the Bank's brief on appeal.

[3] The Bank's figures show $4,945,880 in contributed capital, consisting of $1,922,865 in common stock and $3,023,015 in additional paid in capital. Forty percent of contributed capital is $1,978,352. The Bank's figures also show $2,700,007 in deficit retained earnings, which exceeds forty percent of contributed capital by $721,655. Thus, according to these figures the Bank's contributed capital was impaired.

The Bank argues that these figures are from "interim, unadjusted" statements prepared for internal use that must be adjusted to conform with GAAP. The Bank proposes that: (A) loan loss reserves totaling $1,507,137 and deferred loan fee income totaling $481,587 should be deducted from deficit retained earnings; (B) a capital note worth $844,000 should be included in contributed capital; and (C) deficit retained earnings should be reduced by $390,553 to reflect adjustments necessary to bring the financial statements in line with GAAP.

If each of the Bank's proposed adjustments is accepted, its contributed capital of $4,945,880 would be increased by $844,000 to equal $5,789,880. Forty percent of contributed capital would be $2,315,952. Deficit retained earnings of $2,700,007 would be reduced by amounts of $1,507,137, $481,587, and $390,553 to equal $320,730. According to these adjusted figures the Bank's deficit retained earnings would be $1,995,222 below the impairment mark. We address each of the Bank's arguments in turn.

A.

Loan loss reserves are credit accounts on the asset side of the balance sheet, created by accounting entries that have the effect of increasing deficit retained earnings. They are estimates, required by GAAP, to reduce the recorded value of a loan portfolio to account for loans that will become uncollectible in the future. Deferred loan fees are also credit accounts on the asset side of the balance sheet. They represent fees which the Bank has already received, but for which the earnings process is not yet complete. Because the recognition of these fees is deferred, they have the effect of increasing deficit retained earnings.

[4] The Bank argues that for purposes of the impairment analysis, its deficit retained earnings should be reduced by $1,507,137 in loan loss reserves and $481,587 in deferred loan fees. However, because the impairment calculation must be performed using contributed capital and deficit retained earnings figures as they would be presented on a balance sheet prepared in accordance with GAAP, these adjustments cannot be made. Cal. Fin. Code § 118 (1978).

The Bank contends that the declarations of three certified public accountants, demonstrate that the adjustments can be made consistent with GAAP. Nowhere in these declarations, however, is there a statement that including loan loss reserves and deferred fees in deficit retained earnings is consistent with GAAP.

The Bank also argues that the administrative record shows that a state bank examiner had previously included loan loss reserves in deficit retained earnings

when calculating the impairment of the Bank's contributed capital. But the Bank has taken this calculation out of context. The bank examiner's calculation was based on adjusted financial statements. Because the adjustments increased deficit retained earnings by over $6 million after writing off uncollectible loans, it was also necessary to reverse the $1.5 million estimated allowance for those same losses. But these adjusted calculations are irrelevant because the State chose to proceed on summary judgment using unadjusted figures.

The Bank also argues that loan loss reserves are part of the Bank's capital. This may be true, but it is also irrelevant because capital is not the same as deficit retained earnings.

[5] Our conclusion that deficit retained earnings may not be reduced by loan loss reserves is also supported by an understanding of the function of such reserves. Loan loss reserves are established in order to reflect the reality that a loan portfolio is not worth the total outstanding balance of such loans. By establishing a loan loss reserve, a bank effectively reduces the statement of loan values to an estimate of their net realizable value. If a bank's deficit retained earnings are reduced by the amount of its loan loss reserves, the actual financial condition of the bank may be overstated. Therefore, it makes sense not to allow deficit retained earnings to be reduced by the amount of a bank's loan loss reserves.

B.

A capital note is a liability that can be converted into common stock. Therefore it has characteristics of both

debt and equity. The Bank successfully argued before the district court that its $844,000 capital note should be considered contributed capital. The State cross-appeals from the district court's ruling in the Bank's favor.

[6] The language and structure of the Financial Code indicate that the district court reached an incorrect result. The Financial Code defines contributed capital as "all of shareholders' equity other than retained earnings." Cal. Fin. Code § 134(a) (1978). Thus, in order for a capital note to be contributed capital it must first be an element of shareholders' equity. However, article 4 of the Financial Code, entitled "Shareholders' Equity," considers a capital note to be a liability. *Id.* § 660 (liabilities include but are not limited to "capital notes or debentures and any contingent liabilities"). The conclusion that capital notes are not part of shareholders' equity is further supported by five sections of the Financial Code that list capital notes and shareholders' equity as separate items. *See id.* §§ 670, 763, 1221, 1224, 1231.

The Bank contends that the State has recognized the capital note as part of the bank's capital for all purposes. But capital is not the same as contributed capital. *See Board of Governors v. First Lincolnwood Corp.*, 439 U.S. 234, 240 n.7 (1978) ("While the Board considers capital notes that are subordinated to depositors' demands to be part of a bank's overall capital, it regards them as a less desirable financial cushion than equity.").

The Bank also argues that because a capital note is readily convertible into common stock, GAAP would allow it to be included in contributed capital for purposes

of the impairment analysis. However, none of the declarations filed by the Bank's certified public accountants support this conclusion. The most telling declaration is that of John Bovard Miron, who states that "it is appropriate for purposes of the calculation of impaired capital under California Financial Code Section 134(b) that . . . the capital notes be added back to GAAP contributed capital." The very strong negative inference is that the capital note is not a part of GAAP contributed capital. The statutory requirement that GAAP contributed capital be used in the impairment analysis negates the suggested propriety of the adjustment. *See* Cal. Fin. Code § 118 (1978).

[7] Our conclusion that the capital note is not a part of shareholders' equity or GAAP contributed capital is confirmed by an analysis of the nature of the financial instrument. As we have already explained, a capital note is a hybrid instrument which has characteristics of both debt and equity. Indeed, that the capital note can mandatorily be converted into common stock and that the principal of the note need not be repaid suggest that the capital note would provide a financial cushion similar to that of equity. The capital note has other features, however, which make it more akin to debt. The capital note requires the Bank to make payments of interest to the holder of the note. In addition, although sections 642 through 645 of the Financial Code restrict a bank's ability to pay dividends and to make other distributions to shareholders on the basis of its earnings and shareholders' equity, the holder of the capital note has a legally enforceable right to interest payments regardless of

whether the bank would be prohibited from making distributions to its shareholders. That a bank could be forced to make interest payments on a capital note even while it is encountering financial distress strongly suggests that a capital note is not the equivalent of equity. A capital note clearly provides a less desirable financial cushion than equity, and is properly excluded from shareholders' equity and GAAP contributed capital.

C.

The Bank argues that deficit retained earnings should be reduced by $390,553 to reflect necessary adjustments to the financial statements. The State concedes that adjustments are necessary, but disputes the amount of the adjustments. This issue prompted a series of dueling affidavits in the district court. Ultimately, the district court accepted the State's affidavits, stating that it found the Bank's second declaration "somewhat suspicious."

In reviewing the district court's summary judgment, our task "is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Here, however, any genuine issue created by these affidavits does not relate to a material fact. In light of our previous conclusions, the Bank's proposed adjustment would not avert the impairment of its contributed capital.

We conclude that the Bank's contributed capital was impaired. The Bank's own figures show contributed capital of $4,945,880, forty percent of which is $1,978,352. The Bank's figures also show $2,700,007 in deficit retained

earnings. Even if this figure were reduced by $390,553 to equal $2,309,454, the Bank's contributed capital would still be impaired by $331,102.

II

The Bank argues that summary judgment was improper because it was denied an opportunity to conduct discovery. The State counters that discovery was not necessary because the inquiry was limited to the administrative record. The district court entered summary judgment without ruling on the Bank's pending motion for discovery from the State. "Because the district court did not exercise its discretion, the issue of whether or not it should have presents a legal question which is subject to de novo review." *Garrett v. City & County of San Francisco*, 818 F.2d 1515, 1518 n.3 (9th Cir. 1987).

The State is justified in seizing a bank when the bank's own financial statements demonstrate that its contributed capital is impaired. *FDIC v. Bank of San Marino*, 167 Cal. App. 3d 247, 255 (1985). When, as in this case, the State has relied on the Bank's own financial statements without making any adjustments, the Bank will be hard pressed to show the relevance of any discovery beyond its own records and the State's administrative record.

[8] The Bank contends that by the lack of discovery it was denied access to its own records and, therefore, could not determine the extent to which the statements needed to be adjusted to conform with GAAP. However, these records were in the possession of the FDIC, not the State. The Bank did not seek discovery from the FDIC,

even though it knew that the FDIC was in exclusive possession of its records. Because the Bank failed to seek discovery from the entity that it knew had its records, we conclude that the district court did not err by entering summary judgment without first ruling on the Bank's motion for discovery.

III

In California, when the State takes possession of a bank, the process that is due to the bank is a "hearing and a determination of the facts upon the merits." Cal. Fin. Code § 3101 (1951). The Bank argues that the summary judgment proceeding was not a sufficient hearing, relying on *Trede v. Superior Court*, 134 P.2d 745, 747 (Cal.) (A seized institution may challenge the sate in "a judicial proceeding in which it may present evidence."), *cert. denied*, 320 U.S. 739 (1943), and *Pacific States Sav. & Loan Co. v. Hise*, 155 P.2d 809, 811 (Cal. 1945) (extensive trial held). These cases do not support the argument that summary judgment violates either section 3101 or due process. If the Bank had been able to establish the existence of a genuine issue of material fact, it would have been entitled to a trial. As it was, the Bank was given the opportunity to present evidence. The district court then properly entered summary judgment on the merits. This is all that is required by section 3101.

AFFIRMED.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FIRST PACIFIC BANK, and FIRST PACIFIC BANCORP, INC., Plaintiffs, v. JAMES E. GILLERAN, SUPERINTENDENT OF BANKS, et al., Defendants.	CASE NO. CV 90-6563 JGD ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (Filed May 15, 1991)

On May 6, 1991, the Court heard the following motions: (1) defendants' motion for summary judgment; (2) plaintiffs' motion to stay liquidation; (3) plaintiffs' motion for an order granting discovery; and (4) defendants' motion for sanctions. After due consideration of the arguments presented at that hearing, as well as those presented in the written briefing, the Court HEREBY DENIES defendants' motion for summary judgment.[1]

Factual Background

On August 10, 1990, James E. Gilleran, Superintendent of Banks of the State of California, pursuant to power vested in him under California Financial Code §3100 et seq., took possession of the business and property of First Pacific Bank ("Bank"). On that same day, by

[1] The balance of the motions scheduled for hearing on May 6, 1991 will be rescheduled as set forth below.

previous arrangement, the Superintendent appointed the Federal Deposit Insurance Corporation ("FDIC") as receiver of the Bank and since that day, the FDIC has acted as its receiver.

On August 20, 1990, the Bank filed an action in California Superior Court pursuant to its rights under Financial Code §3101 to challenge the closing of the Bank and seek return of its assets.[2] The FDIC was not named in that action. On November 1, 1990, the Bank filed an amended complaint naming the FDIC as a party to the action. The state court allowed the amended complaint despite the fact that §3101 facially requires filing of an action within 10 days of the bank takeover. The FDIC was served with the amended complaint on either November 3, or November 7, 1990. Proof of service was filed in the superior court on November 16, 1990. On December 3, 1990, the FDIC filed a petition removing the case to this Court. On February 7, 1991, the Court denied plaintiffs' motion to remand.

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[2] Financial Code §3101 provides:
"Whenever the superintendent has taken possession of the property and business of any bank, such bank, within 10 days after such taking, if it deems itself aggrieved thereby, may apply to the superior court in the county in which the head office of such bank is located to enjoin further proceedings. The court, after citing the superintendent to show cause why further proceedings should not be enjoined and after a hearing and a determination of the facts upon the merits may dismiss such application or enjoin the superintendent from further proceedings and direct him to surrender the property and business to such bank."

Motion for Summary Judgment

In support of their motion for summary judgment, defendants argue that California Financial Code §3100 authorizes summary seizure of the property and business of a bank when that entity's contributed capital is impaired. Pursuant to Financial Code §134(b), contributed capital of a bank is impaired whenever the bank has deficit retained earnings that exceed 40% of contributed capital. Defendants contend that summary judgment is mandated here because, in their view, the financial records of the bank reflected deficit retained earnings exceeding 40% of contributed capital at the time of seizure.

In response, plaintiffs contend that the defendants erred in their calculation of both the bank's contributed capital and its deficit retained earnings. Plaintiffs argue that the balance sheet entries for convertible capital notes and loan loss allowance should be included in the calculation of contributed capital and that once these items are included, the bank's records would not reflect impairment of contributed capital. Similarly, plaintiffs contend that the deficit retained earnings figure used by the defendants in determining impairment did not reflect certain accounting adjustments which are not reflected in the internal financial statements of the bank until the end of each quarter.

The real issue raised by defendants' motion is this: does a factual dispute exist as to whether contributed capital was impaired on the date that defendant banking superintendent seized plaintiffs' business and assets? To decide this question, the Court must interpret Financial

Code §134. Specifically, the Court must determine which balance sheet items should be included in the definition of "contributed capital", as that term is used in the analysis of impairment of contributed capital.

The applicable statutory framework provides as follows. Financial Code §3100(a) states:

> "Whenever it appears to the superintendent that: (a) The contributed capital of any bank is impaired . . . the superintendent may forthwith take possession of the property and business of such bank and retain possession until such bank resumes business or its affairs be finally liquidated as herein provided."

The defendants assert that their actions of August 10, 1990 were based on this provision. Lending definition to the critical terms of §3100, §134(b) states:

> "For purposes of this division, the contributed capital of a bank shall be deemed to be impaired whenever such bank has deficit retained earnings in an amount exceeding 40 percent of such contributed capital."

In turn, §134(a) defines contributed capital as:

> " . . . all of shareholders' equity other than retained earnings. However, nothing in this subdivision shall prohibit a bank from transferring amounts from time to time from its retained earnings to its contributed capital, subject to any applicable statutes, regulations, and generally accepted accounting principles."

The issue now before the Court turns on the interpretation of §134(a) which defines contributed capital.

Simply stated, if contributed capital is calculated in accordance with the defendants' methodology, then deficit retained earnings exceeded 40 percent of contributed capital and the superintendent was correct in finding impairment and justified in taking action under §3100 to seize the business and property of the bank.[3] If so, plaintiffs' challenge suit should be allowed to go no further.

Defendants' computation includes amounts in only the accounts entitled (1) common stock, and (2) additional paid-in capital. On the other hand, plaintiffs propose a computation of contributed capital which also includes: (1) capital notes, and (2) allowance for loan losses. Were the Court to find that these additional amounts should be considered part of contributed capital, deficit retained earnings would not have exceeded 40 percent of contributed capital at the time of the superintendent's takeover.[4] In such event, defendants would not

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[3] Defendants' computation, based on the bank's internal consolidated balance sheet as of July 31, 1990, was as follows:

common stock	$1,922,865
additional paid-in capital	3,023,015
contributed capital	$4,945,880
	x 40%
40% of contributed capital	$1,978,352
deficit retained earnings	$2,531,073

Here, deficit retained earnings exceed forty percent of contributed capital. *See also* Declaration of Joseph R. Phelon, filed in support of defendants' motion.

[4] Plaintiffs' computation, based on the bank's internal consolidated balance sheet as of July 31, 1990, is as follows:

common stock	$1,922,865
additional paid-in capital	3,023,015

be entitled to summary judgment and plaintiffs would be entitled to proceed with their challenge suit in accordance with Financial Code §3101.

1. Capital Notes

Plaintiffs claim that, by its own terms, the bank's "Mandatorily Convertible Subordinated Capital Note" should be included in the computation of contributed capital. The capital note was issued by First Pacific Bank to its parent, First Pacific Bancorp. The declaration of Joseph J. Stein, filed in support of plaintiff's opposition to summary judgment, states that the $844,000 note is convertible into 281,052 shares of common stock on its fifth anniversary (May, 1993), if not retired sooner. He declares that the terms and conditions of the note indicate that there is absolutely no requirement for repayment.

Moreover, plaintiffs argue that the capital note should be included in the computation of contributed capital here because the State Banking Department, stated in an October, 1988 letter that "the amount of the capital note may now be included in capital for all purposes, including the calculation of lending limits." *See* Declaration of John Bovard Miron, Ex. E.

---

subordinated capital note	844,000
reserve for loan losses	1,506,577
contributed capital	$7,296,457
	x 40%
40% of contributed capital	$2,918,583
deficit retained earnings	$2,531,073

In response, defendants argue that despite its sweeping language, the Banking Department's letter of October, 1988 does not indicate that the capital note may be included in *contributed* capital, and to interpret the phrase "may be included in capital for all purposes" literally would be inconsistent with other indications in the Financial Code that capital notes are separate and distinct from shareholders' equity. For example, Financial Code §670, which authorizes the issuance of capital notes and imposes restrictions upon their repayment, refers at one point to "the aggregate of the shareholders' equity and capital notes". Defendants contend that this reference indicates that the legislature did not intend shareholders' equity and capital notes to be interpreted as synonymous.

The Court finds that even though the Financial Code distinguishes between shareholders' equity and capital notes, the State Banking Department's letter and the capital note's mandatory convertibility into common stock combine to support the conclusion that the capital note should be included in the computation of contributed capital.[5]

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[5] Counsel for defendants appeared to contend at the hearing that viewing the capital notes as part of contributed capital would somehow violate Financial Code §670. However, that section only serves to place restrictions on the payment of sums on account of the principal of such notes. No principal payments are at issue in the instant circumstances.

Similarly, counsel for defendants made an argument against inclusion of the capital notes on the ground that FDIC approval was required and had not been granted. The Administrative Record at P.586 does reflect that by the terms of the State Banking Department's approval of the issuance of the capital notes, FDIC approval is required for sale or conversion of the notes.

However, even when the capital notes are added to contributed capital, the bank's deficit retained earnings still exceed 40 percent of contributed capital.[6] In other words, even with the capital notes included, contributed capital was impaired at the time of the superintendent's actions. Therefore, unless the Court also finds that the allowance for loan losses should be included in contributed capital or that certain adjustments to the computation of deficit retained earnings should be considered, the Court must grant summary judgment in favor of defendants.

2. Allowance for Loan Losses

Plaintiffs' chief argument for including the allowance for loan losses in the computation of contributed capital

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However, the Court is of the view that neither a sale nor conversion of the capital notes is necessary for purposes of the computation of contributed capital under §134. This position is supported by the implications apparent in the State Banking Department's letter of October, 1988, which grants sweeping rights to the bank to include the capital notes in capital computations without sale or conversion of the notes.

[6] The revised computation, based on the bank's internal consolidated balance sheet as of July 31, 1990, would be as follows:

common stock	$1,922,865
additional paid-in capital	3,023,015
subordinated capital note	844,000
contributed capital	$5,789,880
	x 40%
	$2,315,952
deficit retained earnings	$2,531,073

Here, deficit retained earnings exceed forty percent of contributed capital.

is that state and federal regulations controlling capital requirements for lending limit purposes include allowances for loan losses in their computations of lending maximums. *See* Financial Code §§1221(a), 1221(b), 1224(a), 1225, and 1231(d); and FDIC examination guidelines cited in Decl. of Miron, para. 18.

In response, defendants argue that the capital definitions cited by plaintiffs – which all relate to lending limits – have nothing to do with the determination of impairment of capital for purposes of regulatory action under California law. Defendants also argue that the one federal regulation that is analogous to the instant inquiry – that which controls the determination of insolvency and eligibility for receivership – excludes allowance for loan losses from its definition of common shareholders' equity. 12 CFR §5.49(c)(1)(i)(A). Further, defendants argue that the loan loss allowance is not an unencumbered fund which may be freely transferred to shareholders' equity. Instead, defendants explain that, in accordance with Generally Accepted Accounting Principles, loans must be stated at net realizable value. A loan loss allowance is merely a part of a two-part entry necessary to reduce the statement of loan values to their net realizable value.

The Court is inclined to adopt the position urged by defendants. Nothing presented by plaintiffs supports use of loan loss allowance in the computation of contributed capital in a capital impairment analysis. All of plaintiffs support comes from the context of lending limits based on capital. At most, the Financial Code sections cited by plaintiff allow summation of shareholders' equity, capital notes, and allowance for loan losses in computation of the bases for various lending limits. In no instance do these

sections indicate that allowance for loan losses is somehow part of contributed capital or shareholders' equity. Further, the Court views the defendants' explanation of net realizable value of loan balances as additional persuasive authority for excluding the Bank's loan loss allowance from the definition of contributed capital.

Hence, the Court must conclude that allowance for loan losses is not an item appropriately included in the computation of contributed capital.

3. Deficit Retained Earnings

It is undisputed that in concluding that the bank's contributed capital was impaired, the superintendent relied upon the bank's own internal financial statements. Plaintiffs contend that these informal internal financial statements do not reflect certain adjustments that become necessary when the statements are to be used for external purposes such as capital impairment analysis.

The declaration of Jose M. Anotado, controller of First Pacific Bank, states that certain adjustments necessary for an accurate presentation of the bank's financial condition are only made on a quarterly basis and are not reflected in the July 31, 1990 statements used by the superintendent. Most notably, Mr. Anotado declares that an adjustment for $148,500 is necessary to reverse out over-accrued reserves for expenses. This adjustment would increase current period income, hence increasing deficit retained earnings as of July 31, 1990. *See* Anotado Decl. at para. 26 and Ex. C attached thereto. His presentation also includes a sizable adjustment for unaccrued income. Importantly, if the Court adopts the adjustments

outlined by Mr. Anotado, in addition to finding that capital notes should be part of contributed capital, the bank would narrowly avoid a conclusion of statutory contributed capital impairment (by less than $3,300).[7]

In response, the defendants argue that the adjustments cited by plaintiffs are only those which would tend to increase deficit retained earnings.[8] At the hearing, defendants also raised some question about the amount of certain accruals outlined by Mr. Anotado because the adjustments reflect full month accruals for August, 1990, while the Bank was seized as of August 10, 1990.

The Court finds that formal accounting adjustments to the Bank's internal trial balances should have been considered by the defendants in their computation of impairment of contributed capital. Fundamental fairness

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[7] Adopting the adjustments from Ex. C to the Anotado declaration, the impairment analysis is as follows:

common stock	$1,922,865
additional paid-in capital	3,023,015
subordinated capital note	844,000
contributed capital	$5,789,880
	X 40%
40% of contributed capital	$2,315,952
deficit retained earnings per unadjusted statements	$2,531,073
over-accrued expenses	(148,500)
income items not accrued	(69,844)
adjusted deficit R/E	$2,312,729

[8] Unfortunately, defendants do not specify adjustments that would worsen deficit retained earnings, and correspondingly, move the bank back into technical impairment of contributed capital.

requires that an act as serious as seizure of a bank's assets and business must not be done on the basis of inaccurate or incomplete information. However, the Court finds that a genuine issue of material fact exists as to nature and amount of the adjustments to retained earnings proposed by plaintiffs. While the defendants' critique of the adjustments proposed by plaintiffs is too incomplete to be conclusive, it does raise questions about exact amounts of the adjustments. Moreover, the Court must insist on precision in this computation in view of the extremely small margin of error pointed up by Mr. Anotado's proposed computation.

Accordingly, in view of the Court's determinations that the capital notes may be included in the computation of contributed capital of the bank and that a genuine issue of fact exists as to the amount of the required adjustments to the bank's retained earnings, the Court finds that a genuine issue of material fact exists as to whether contributed capital was impaired on the date of the superintendent's action. Therefore, defendants motion for summary judgment must be denied.

Conclusion

The Court's denial of defendants' summary judgment motion is made without prejudice. In accordance with the analysis outlined above, a fairly narrow supplementation to the material previously presented to the Court may well settle the impairment issue rather readily, one way or the other. Further, because summary judgment in favor of defendants would have ended the case and make consideration of the other motions unnecessary, the Court

limited argument at the May 6, 1991 hearing to the summary judgment issue.

For these reasons, the Court HEREBY ORDERS that further hearing in this matter be held on June 10, 1991, at 2:30 p.m. in courtroom 15. At that time the Court will hear argument regarding the other motions originally scheduled for argument on May 6, 1991. Further, such hearing could be used to entertain renewal of defendant's summary judgment motion, should defendants wish to do so, consistent with the findings of this Order.

IT IS SO ORDERED.

Dated: MAY 15 1991

/s/ John G. Davies
JOHN G. DAVIES
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FIRST PACIFIC BANK, and FIRST PACIFIC BANCORP, INC., Plaintiffs, v. JAMES E. GILLERAN, SUPERINTENDENT OF BANKS, et al., Defendants.	CASE NO. CV 90-6563 JGD ORDER GRANTING DEFENDANTS' RENEWED MOTION FOR SUMMARY JUDGMENT (Filed Jul. 8, 1991)

On June 17, 1991, the Court heard argument of defendants' renewed motion for summary judgment. After consideration of the arguments offered at that hearing, as well as those in the written briefing, the Court HEREBY GRANTS defendants' motion for summary judgment.

This case is essentially an administrative challenge to the actions of the California State Banking Department. On August 10, 1990, the defendant regulators seized the plaintiffs' property and business pursuant to Financial Code §3100, based, *inter alia*, on an alleged impairment of contributed capital.

On May 15, 1991, the Court issued an Order denying defendants' initial motion for summary judgment. In that motion, the central issue was whether the bank's contributed capital was statutorily impaired on August 10, 1990, the date of the Superintendent of Banks' seizure of its

business and property.[1] After determining which balance sheet items should, and should not, be included in the computation of contributed capital[2], the Court found that the outcome of the impairment analysis boiled down to whether the regulators should have made certain income and expense adjustments to the bank's internal financial statements, hence altering the bank's deficit retained earnings.

In the May 15, 1991 Order, the Court found that because defendants had not addressed the adjustments issue adequately, genuine issues of material fact existed which precluded a finding that the adjustments were not necessary. In turn, the Court could not conclude that the bank's capital was impaired on the date of takeover, and summary judgment could not be granted. But the May 15, 1991 Order invited the defendants to renew their summary judgment motion, focusing specifically on the adjustments issue.

Standard

The moving party bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the record which it believes demonstrate the absence of a genuine issue of

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[1] Financial Code §134 provides that contributed capital is impaired when deficit retained earnings exceeds 40% of contributed capital.

[2] The Court found that the bank's capital note should be included in contributed capital, but that allowance for loan losses should not be so included. *See* May 15, 1991 Order at p.6-10.

material fact. *U.S. v. Wilson*, 881 F.2d 596, 601 (9th Cir. 1989) *citing Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). The non-moving party must then offer evidence of such a caliber that a fair minded jury could return a verdict for the non-moving party on the evidence presented. The mere existence of a scintilla of evidence in support of the non-moving party's position will be insufficient. *Id. citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 2512 (1986). However, in assessing the non-moving parties' presentation, a court must consider the evidence in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 255, 106 S.Ct. at 2513 (1986).

Discussion

Defendants' position in the renewed motion is that the bank's contributed capital was impaired, even using the figures from its own books and giving recognition to the adjustments it proposes, if one over-accrual (for RIWN interest) is restated to reflect amounts attributable to only the first ten days of August. Their argument relies upon the declaration of Masanori P. Yamaguchi, a Certified Public Accountant employed by the California State Banking Department. His declaration analyzes the proposed adjustments offered by plaintiffs in the first declaration of Jose Anotado, filed in support of plaintiffs' opposition to the original summary judgment motion.

Yamaguchi appears correct in his contention that footnote 3b.of Exhibit D. of Anotado's original declaration suggests that amounts for both July and August were included in the proposed RIWN interest adjustments.

Footnote 3b. is, in fact, entitled "Income accrual of various RIWN's for July & August which were not taken up." The amount is $139,688. Supporting his conclusion that the $139,688 figure includes a full monthly accrual for August, Yamaguchi points out that Ex. C to the original Anotado declaration reflects a RIWN accrual of $69,844 for July, 1990. Yamaguchi notes that $139,688 is exactly twice as much as $69,844, leading him to conclude that $69,844 is a full monthly accrual for the RIWN's, and that Ex. D, footnote 3b. included full accrual for both months.

From his conclusion that plaintiffs have included a full month's RIWN accrual for August in their proposed adjustments, Yamaguchi goes on to compute the corrected accrual as $69,844 multiplied by ten (the number of days in August prior to the seizure) divided by thirty one (the total number of days in August), or $22,530. At Ex. A of his declaration, he inserts this corrected accrual into the impairment analysis, and concludes that the bank's capital was impaired as of August 10, 1990.

However, in response to Yamaguchi's computations, plaintiffs offer a second declaration of the bank's controller, Jose Anotado. At para. 1 of that declaration, Anotado states:

> "The RIWN accrual amount shown on Exhibit 'D', at footnote (3)b., did not include any accrual for the month of August 1990. Rather, the amount of $139,688 represented thereon, was an amount that had not yet been taken up previously, for June 1990 and July 1990, only, but was *taken up* in the month of August 1990 for the

> purpose of preparing a statement of condition as of August 10, 1990" (emphasis original).

At para. 3 of that declaration Anotado adds:

> "I declare that there was no provision whatsoever for accrual of income on the RIWN's for the month of August 1990, and that any reference thereto in Exhibits 'C' and 'D' to my prior declaration was inadvertent error. The aggregate sum of $139,688 on Exhibit 'D' is comprised solely from accruals of income for the RIWN's for June 1990 and July 1990, only."

Attached as Ex. C to Anotado's second declaration is a revised impairment computation, reflecting RIWN accruals for June and July, instead of July and August. Under this analysis, the bank's contributed capital was not statutorily impaired at the relevant date.

To rebut the second Anotado declaration, the defendants filed a supplemental declaration of Masanori Yamaguchi, the C.P.A. at State Banking Department. The thrust of that supplemental declaration is that a double-counting of the RIWN accrual for June, 1990 would result were the Court to adopt the RIWN adjustment described by Anotado in his second declaration.

Yamaguchi supports his supplemental assertion by reference to Adm. Rec. p. 03920-03934, attached as Ex. A to his supplemental declaration. His argument is that the bank's July 31, 1990 general ledger[3] already includes six

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[3] Yamaguchi contends that the impairment analysis included in Ex. C of Anotado's first declaration begins with the figures on the bank's July 31, 1990 general ledger.

months accrual for RIWN income.[4] Hence, to bring the RIWN accrual current through August 10, 1990 (the date of the regulators' action), no June accrual is necessary. Only an accrual for one whole month (July), plus ten days (August 1-10) is required. Therefore, he argues, the Court should reject the explanation of RIWN accruals provided in Anotado's second declaration and should, instead, adopt the reasoning of the renewed motion. I.e. using the bank's own books, and the bank's proposed adjustments, capital was impaired on August 10, 1990 if the bank's RIWN adjustment is restated. *See* Ex. A to the original Yamaguchi Declaration.

The Court finds the Yamaguchi evidence to be conclusive. Anotado's second declaration was immediately somewhat suspicious in its mysterious reference to the necessity for a RIWN accrual for June (to replace the express reference to an August accrual in Ex. D to his original declaration). But the analysis provided in the supplemental Yamaguchi declaration firmly refutes the need for a June accrual. Hence, the Court finds that no genuine issue of material fact remains as to the proper adjustment for the accrual of income from the bank's RIWN's. The appropriate computation is found in the Yamaguchi declaration, para. 7.[5]

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[4] The July 31, 1990 general ledger figure for RIWN income (a.k.a. HUD Notes Purchased) is $419,623. Adm. Rec. at p.03920. Yamaguchi contends that the monthly accrual is $69,844, per Ex. C to the first Anotado Declaration. Six months times $69,844 equals $419,623.

[5] The Court also received and considered a declaration filed on June 14, 1991, by plaintiffs' counsel William A. Klapperman. This declaration was filed in response to the supplemental

While it may seem inequitable to grant summary judgment on the basis of a seemingly technical accounting issue, Financial Code §134's test for statutory impairment of contributory capital is very straightforward. Applying that test, and based on the rulings made both in the previous motion for summary judgment and in this renewed motion, the Court finds that no genuine issue of fact remains as to whether the bank's capital was impaired on August 10, 1990. *See* Yamaguchi Declaration, Ex. A. Accordingly, the Court must grant the renewed motion for summary judgment.[6],[7]

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declaration of Masanori Yamaguchi. The analysis offered by Mr. Klapperman does not refute the conclusions reached by Mr. Yamaguchi or the Court.

In analyzing the RIWN accrual issue, Yamaguchi's computations make direct use of the bank's general ledger. On the other hand, the Klapperman declaration points to certain supplemental work papers in the administrative record in an effort to raise questions about Yamaguchi's conclusions. The Klapperman declaration does not explain how the supplemental calculations to which it refers are reflected on the books of the bank or the purpose for which those schedules where prepared. Accordingly, the Court finds that Klapperman's reference to the supplemental HUD Notes schedules does not raise a genuine issue about the appropriate RIWN adjustment.

[6] Based on the Court's ruling on this motion, it need not reach plaintiffs' motion for stay, plaintiffs' motion to compel discovery, or defendants' motion for sanctions.

[7] Plaintiffs also argue that a grant of summary judgment at this stage of the proceeding is inconsistent with their statutory right to judicial review pursuant to Financial Code §3101. However, §3101 only calls upon the Court to hold a hearing and determine the facts, and then conclude whether the superintendent should be enjoined or ordered to surrender the property seized. The Court has held such hearings and made a

IT IS SO ORDERED.

Dated: JUL 03 1991

/s/ John G. Davies
JOHN G. DAVIES
United States District Judge

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determination of the facts sufficient to dispose of plaintiffs' application for relief. Hence, plaintiffs have been denied no rights afforded them by §3101.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FIRST PACIFIC BANK; FIRST PACIFIC BANCORP, INC., Plaintiffs-Appellants, -vs- JAMES E. GILLERAN; CALIFORNIA STATE BANKING DEPARTMENT; FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for First Pacific Bank, Defendants-Appellees.	No. 91-55890 D.C. No. CV-90-6563-JGD (Filed Jan. 12, 1995)
FIRST PACIFIC BANK; FIRST PACIFIC BANCORP, INC., Plaintiffs-Appellees, -vs- JAMES E. GILLERAN; CALIFORNIA STATE BANKING DEPARTMENT, Defendants-Appellants.	No. 91-56081 ORDER DENYING REHEARING

Before: WALLACE, Chief Judge, REINHARDT, Circuit Judge, and TANNER,* District Judge.

*Honorable Jack E. Tanner, United States District Judge, Western District of Washington, sitting by designation.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

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(2)

No. 94-1865

Supreme Court, U.S.
FILED
JUN 12 1995
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In The

Supreme Court of the United States

October Term, 1994

FIRST PACIFIC BANK and
FIRST PACIFIC BANCORP, INC.,

Petitioners,

v.

JAMES E. GILLERAN, SUPERINTENDENT OF BANKS,
CALIFORNIA STATE BANKING DEPARTMENT, and
FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

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QUESTION PRESENTED

As applied to petitioners, a closed bank and its holding company, does the summary judgment procedure provided for in rule 56 of the Federal Rules of Civil Procedure comply with due process? More specifically, were petitioners denied due process by the granting of summary judgment against them based upon the closed bank's own records, when petitioners never sought discovery from the post-closure custodian of the closed bank's records?

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No. 94-1865

In The

Supreme Court of the United States

October Term, 1994

FIRST PACIFIC BANK and
FIRST PACIFIC BANCORP, INC.,

Petitioners,

v.

JAMES E. GILLERAN, SUPERINTENDENT OF BANKS, CALIFORNIA STATE BANKING DEPARTMENT, and FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Respondents Conrad W. Hewitt, current successor to James E. Gilleran, Superintendent of Banks of the State of California,[1] and the California State Banking Department, respectfully request that this Court deny the Petition for Writ of Certiorari submitted by First Pacific Bank and

[1] Conrad E. Hewitt took office as Superintendent of Banks on May 1, 1995.

First Pacific Bancorp, Inc. (hereinafter referred to as "Petitioners").

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions cited by Petitioners at pages 2 and 3 of the Petition for Certiorari, Respondents cite the following provisions.

Section 118 of the California Financial Code provides:

> "(a) All references in this division and in Division 1 (commencing with Section 100), Title 1 of the Corporations Code to financial statements, balance sheets, income statements and statements of changes in financial position of a bank and all references to assets, liabilities, earnings, retained earnings, shareholders' equity, and similar accounting items of a bank mean such financial statements or such items prepared or determined in conformity with generally accepted accounting principles then applicable, fairly presenting in conformity with generally accepted accounting principles the matters which they purport to present, subject to any specific accounting treatment required by any provision of Division 1 (commencing with Section 100), Title 1 of the Corporations Code, of this division, or of any regulation or order issued under this division.
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> "(b) The superintendent may, by regulation or order, require that any financial statement or accounting item of a bank be prepared or determined in a manner other than in conformity with generally accepted accounting principles if

> he finds that such other manner is necessary or appropriate to carry out the purposes or provisions of this division."

Section 134 of the California Financial Code provides:

> "(a) 'Contributed capital' means all of shareholders' equity other than retained earnings. However, nothing in this subdivision shall prohibit a bank from transferring amounts from time to time from its retained earnings to its contributed capital, subject to any applicable statutes, regulations, and generally accepted accounting principles.
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> "(b) For purposes of this division, the contributed capital of a bank shall be deemed to be impaired whenever such bank has deficit retained earnings in an amount exceeding 40 percent of such contributed capital."

Section 3221 of the California Financial Code provides:

> "The superintendent, when he has taken possession of the property and assets of a closed bank for the purpose of liquidation and if he deems it advisable, may tender to the [Federal Deposit Insurance] corporation the appointment as receiver of such bank."

Federal Rules of Civil Procedure Rule 56, Summary Judgment, is set forth on Appendix pages 1a through 3a.

STATEMENT OF THE CASE

California Respondents are not in agreement with the Statement of the Case as presented by Petitioners.

Petitioners portray themselves as innocent victims of abrupt, arbitrary and baseless action by the Superintendent. In sharp contrast to Petitioners' assertions that they had no notice or opportunity to be heard by the Superintendent stands the 15,000-plus page Administrative Record which is replete with evidence of pre-closure meetings and other communications between the Superintendent and the management and Board of Directors of First Pacific Bank (hereinafter referred to as the "Bank") regarding the Bank's financial condition, the remedial actions which the Bank needed to take, and the potential consequences of failure to take such actions.

As reflected in the Order Taking Possession of the Property and Business of the Bank, the Superintendent had determined that many of the Bank's loans and other assets had to be written down to reflect a fair representation of their value. The Bank and its directors were notified both orally and in writing that the Bank needed a capital infusion in excess of $9,000,000.00 in order to avert serious action by the Superintendent.

On August 10, 1990, after that extensive consultation and communication with the Bank, the Superintendent of Banks of the State of California issued and served an order taking possession of the property and business of the Bank followed by the issuance and service of an order that the Bank be liquidated. Within a few minutes after service of those orders, pursuant to California Financial Code section 3221, the Superintendent tendered the appointment as receiver of the Bank to the Federal Deposit Insurance Corporation (hereinafter referred to as the "FDIC"), which tender was thereupon accepted by the FDIC.

On August 20, 1990, Petitioners timely filed an action under California Financial Code section 3101, challenging the Superintendent's closure of the Bank. Petitioners did not name the FDIC as a defendant in the proceeding at that point.

On September 4 and 26, 1990, Petitioners served discovery requests on the Superintendent.

On September 28, 1990, the Superintendent filed a demurrer based upon the Bank's failure to name the FDIC as an indispensable party defendant without whom the action could not proceed.

On October 9, 1990, the Superintendent lodged the administrative record with the Superior Court.

On November 1, 1990, Petitioners amended their action to add the FDIC as a defendant.

On November 14, 1990, the Superintendent filed a motion for summary judgment in the Los Angeles County Superior Court. This motion sought summary judgment based on only one independent statutory ground (impairment of contributed capital) for closure; the motion was supported solely by entries contained in the Bank's own records. The other bases for the Superintendent's administrative action were not included in this motion for summary judgment. On the same day, Petitioners filed a motion to compel their earlier discovery request, which named only the Superintendent and which did not seek discovery of the Bank's own records, which were in the custody of the FDIC as liquidator of the property and business of the Bank.

On December 3, 1990, the Superintendent and Petitioners stipulated to extend the motion hearing dates on Petitioner's discovery motion, Petitioner's then pending motion to stay liquidation or for preliminary injunction, and the Superintendent's summary judgment motion, together with the time for the Superintendent to answer Petitioner's first amended complaint.

On December 3, 1990, the FDIC removed the case to the United States District Court for the Central District of California pursuant to 12 U.S.C. § 1819(B)(2)(b).

On February 11, 1991, the district court denied Petitioners' motion to remand the case back to the Los Angeles County Superior Court.

On March 4, 1991, the Superintendent renoticed his motion for summary judgment in the district court as originally filed in the Los Angeles Superior Court.

On March 22, 1991, without changing the scope of their discovery request and without requesting any discovery from the FDIC, Petitioners renoticed their motion for an order granting discovery.

On March 25, 1991, the Superintendent and Petitioners stipulated to continue the date for hearing on the Superintendent's summary judgment motion to April 22, 1991, the date then set for the hearing on Petitioner's Motion for Order Granting Discovery.

On April 8, 1991, the Superintendent filed opposition to Petitioners' discovery motion.

Both matters came on for hearing in the district court on May 6, 1991. The court suggested that the disposition of the motion for summary judgment precede the other

motions, since, if summary judgment were granted, there would be no reason to rule on the other motions. When the court inquired as to whether this was correct,[2] Petitioners did not offer any response and did not suggest in any way that the discovery motion had a bearing upon and should be decided before the motion for summary judgment.

On May 15, 1991, the district court denied the Superintendent's motion for summary judgment without prejudice and allowed renewal of the Superintendent's motion for summary judgment. (See, Petition, page 27a.)

On May 31, 1991, the Superintendent renewed his motion for summary judgment.

On July 3, 1991, the district court granted the Superintendent's renewed motion for summary judgment. (See, Petition, pages 28a-35a.)

The Ninth Circuit Court of Appeals affirmed the United States District Court's grant of a motion for summary judgment in favor of Respondents herein. In doing so, the Court of Appeals held, *inter alia*, that the Superintendent was justified in taking possession of the Bank when the Bank's own financial statements demonstrated

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[2] "THE COURT: Well, just hold up a moment, because my suggestion is this: I would imagine that the disposition of the Summary Judgment motion, if it is granted, there is no need to visit the other motions. If it's denied then, of course, one must visit the other motions; correct?" Reporter's Transcript of Proceedings, United States District Court, Central District of California, May 6, 1991.

that its contributed capital was impaired;[3] that establishment of that justification through the summary judgment process was appropriate in that it afforded the Bank an opportunity to present evidence and was a judgment on the merits; and that because of the Bank's failure to seek discovery from the FDIC, when the Bank knew the FDIC was in possession of the records in issue, the district court's entry of summary judgment without ruling on the Bank's motion for discovery was appropriate.

SUMMARY OF THE ARGUMENT

Petitioners appear to want this Court to decide whether summary judgment is generally appropriate in challenges to regulatory closures of financial institutions. Due to the special nature of the facts herein, this case is an inappropriate vehicle for such an inquiry.

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[3] Petitioners continue to argue (Petition, page 16) as if the Bank's closure was finally confirmed on an " 'extremely small margin of error.' " While the district court held that the contributed capital was impaired only by a margin of $40,000, the Ninth Circuit Court of Appeals held that, contrary to the district court's approach, an $844,000 capital note was not part of shareholders' equity or GAAP contributed capital, thus establishing a broad margin of impairment under the California statutory standard. Petition, pages 9a through 12a. The question presented to this Court by Petitioners does not challenge the appellate court's holding regarding the capital note nor the appellate court's determination that the Superintendent's evidence was sufficient to support a holding that the Bank's contributed capital was impaired.

The Superintendent could have proceeded to trial in this case on all of the grounds for closure which had been developed in the immense administrative record. In order to avoid such protracted litigation, the Superintendent chose to move for summary judgment on a very narrow and straightforward issue: whether the Bank's contributed capital was impaired according to the statutory definition, based upon nothing but the Bank's own books and records. If it was, as the courts below later found it to be, then all inquiry into the propriety of the Bank's closure was properly at an end.[4] All the Bank had to do to avert that summary judgment was to establish the existence of a genuine issue of material fact. The Bank had every opportunity to secure and present evidence to this effect, which it simply failed to do.

To be sure, Petitioners filed a motion to compel discovery which was never heard by the court. However, their actions with regard to that motion, including their failure to object to the district court's proposal that the summary judgment motion be decided first, demonstrate

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[4] Under this Court's rule 14.1 (a), "[o]nly the questions set forth in the petition, or fairly included therein, will be considered by the Court." Since the question presented to this Court by Petitioners does not challenge the appellate court's determination that the Superintendent's evidence was sufficient to support a holding that the Bank's contributed capital was impaired, there is no need to complicate this opposition with detailed explanations of what constitutes such impairment of contributed capital and how the Superintendent's evidence supported the appellate court's holding that such impairment was established.

clearly that the discovery motion's purpose was to aid petitioners in obtaining evidence to present at a plenary hearing, one which would take place only if summary judgment were denied. In the meantime, Petitioners entirely failed to seek evidence from the Bank's books and records which they knew to be in the hands of the FDIC as liquidator of the Bank's property and business.

The Ninth Circuit Court of Appeals, in a holding which is not in conflict with any decision of any other circuit court of appeals, very properly concluded that under the specific factual context of this case Petitioners had not been deprived of due process in having summary judgment entered against them. Whether due process might require plenary hearing in another case involving the closure of a financial institution is a question which is not properly before this Court.

REASONS FOR DENYING THE WRIT

I.

THE NINTH CIRCUIT COURT OF APPEALS' DECISION IS NOT IN CONFLICT WITH THE DECISION OF ANY OTHER UNITED STATES COURT OF APPEALS

Petitioners refer (Petition, page 15) to a purported "divergence of judicial opinion" on the issue they present. But the cases they cite are district court cases which are not inconsistent with the challenged holding of the

Ninth Circuit Court of Appeals.[5] There is no conflict with the decision of any other court of appeals; in fact,

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[5] Petitioners' citation to *Lincoln Sav. & Loan Ass'n v. Wall*, 743 F. Supp. 901 (D.D.C. 1990) (Petition, pages 17-18) in support of a "wide-ranging evidentiary hearing" overstates the case. There, the district court in a footnote to its opinion (note 3, page 904) was referring to the hearing which was held to determine the completeness of the administrative record as opposed to a plenary hearing to which Petitioners claim they are entitled. In *Telegraph Sav. & Loan Ass'n v. FSLIC*, 703 F.2d 1019 (7th Cir. 1983), cert. denied, 464 U.S. 992 (1983), the appellate court *affirmed* the trial court's (*Telegraph Sav. & Loan Ass'n v. FSLIC*, 564 F. Supp. 862 (N.D. Ill. 1981)) *grant* of partial summary judgment and the limitation of the trial to the remaining issue of the insolvency of the institution under the "book net worth test" in a bench trial. This process is analogous to the instant case with the exception that in the instant case an independently sufficient ground for closure of the Bank was clear on the face of the Bank's own books. Petitioners' reliance upon *San Marino Sav. & Loan Ass'n v. FHLBB*, 605 F. Supp. 502 (C.D. Cal. 1984), is inapposite, since *San Marino* was not a summary judgment case. The fact that a trial was held is immaterial when no motion for summary judgment was made.

Petitioners themselves cite several cases in which the court in fact granted full summary judgment to the regulator. *Marrietta Franklin Sec. Co. v. Muldoon*, 770 F. Supp. 1212 (S.D. Ohio 1991), appeal dismissed, 972 F.2d 128 (6th Cir. 1992) (Petition, page 17); *Collie v. FHLBB*, 642 F. Supp. 1147 (N.D. Ill. 1986) (Petition, page 18); *Gibraltar Sav. v. Ryan*, 772 F Supp. 1290 (D.D.C. 1991) (Petition, page 19). In none of the cases cited by Petitioners does the court opine that summary judgment is not a constitutionally permitted procedure in challenges to closure of financial institutions. Certainly none of those cases even deals with the context of this case, wherein the Ninth Circuit Court of Appeals has affirmed summary judgment confirming the seizure of a bank "when the Bank's

this case has none of the considerations enumerated in rule 10 of this Court as reasons for the granting of certiorari.

II.

PETITIONERS SLEPT ON THEIR DISCOVERY RIGHTS AND ARE BARRED FROM ASSERTING THEIR OWN INACTIVITY AS AN EXCUSE

Throughout the Petition, constant reference is made to Petitioners' alleged lack of opportunity to obtain information supposedly vital to their opposition to the motion for summary judgment. At the outset, it is important to note that the only source of such information to which Petitioners make even oblique reference is the accounting records of the Bank. The Superintendent did not possess or control such information and at no time during the pendency of these proceedings has the Superintendent done so. The Bank's accounting records have at all relevant times been in the sole possession and control of the FDIC, a circumstance well known to Petitioners.

The record is replete with references to attempts by Petitioners to range far and wide in their requests directed to the Superintendent for information and documents which are beyond the scope of any issues which would be properly before the court even if a plenary trial were held. No matter how many times Petitioners mention these attempts, however, they still have no bearing

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own financial statements demonstrate that its contributed capital is impaired (citation)" (Petition, page 13a), thus establishing an independently sufficient ground for closure.

on Petitioners' lack of diligence in obtaining the accounting information which they speculate would have aided them in opposing the summary judgment motion. At no time during the interval between November 14, 1990, the date upon which the Superintendent filed the summary judgment motion, and the entry of the Order Granting Defendant's Renewed Motion for Summary Judgment on July 12, 1991, did Petitioners serve discovery seeking the production of or access to the accounting records of the Bank in order to oppose the summary judgment motion.

In *California Union Ins. v. American Diversified Sav.*, 914 F.2d 1271 (9th Cir. 1990), cert. den., 498 U.S. 1088 (1991), the court, in the context of litigation arising out of the collapse and subsequent takeover of a failed thrift institution, examined the issue of whether it was an abuse of discretion for the district court to decide a summary judgment motion without allowing additional time for discovery. The appellate court held that the district court did not abuse its discretion in granting a summary judgment motion because continuance was within the discretion of the district court and that denying discovery was not an abuse of discretion where there had been a failure diligently to pursue discovery. *Id.* at 1278.

As applied to the instant case, Petitioners slept for eight months on their general discovery requests; failed to seek a continuance in order to conduct discovery specifically related to the summary judgment motion; failed to seek any discovery from the FDIC, which the Bank should have known had custody of the accounting records of the Bank; and failed to object to the district court's proceeding to hear the summary judgment motion

prior to addressing Petitioners' general discovery requests when the district court made inquiry regarding such procedure.

The significance of the foregoing is that the general discovery requests promulgated by Petitioners while they were in the Los Angeles Superior Court were directed to their preparation for a plenary trial of all of the issues raised in their First Amended Complaint, as opposed to and in contrast with seeking specific discovery of the Bank's accounting records from the FDIC in order to oppose the summary judgment motion as it was heard in the district court.

The objective reality is that, as detailed *supra*, Petitioners cooperated in the creation of a timing schedule the result of which was that any order of the court regarding their discovery requests would come at a time when it would not be of aid to them in opposing the Superintendent's motion for summary judgment. Any order issued by the court in their favor in response to their discovery motion would have been issued at a time when all briefing on the Superintendent's motion for summary judgment had been completed.

Now, before this Court, Petitioners belatedly argue that they were denied discovery as a means of opposing the summary judgment motion. Petitioners' argument has no merit.

Rule 56(f) of the Federal Rules of Civil Procedure provides the opportunity to establish the need for discovery in order to oppose a motion for summary judgment.

In *Hudson River Sloop Clearwater v. Dept. of Navy*, 891 F.2d 414 (2nd Cir. 1989), the court considered the claim that summary judgment should not have been granted by the district court where the non-moving parties requested time in which to conduct discovery pursuant to rule 56(f). In affirming the district court's grant of summary judgment the appellate court, finding the appellant's affidavit to be deficient, held that:

> "Thus, a party seeking such discovery must file an affidavit explaining (1) what facts are sought and how they are to be obtained, (2) how those facts are reasonably expected to create a genuine issue of material fact, (3) what effort the affiant has made to obtain them, and (4) why the affiant was unsuccessful in those efforts [citation]." Id. at 422.

Petitioners failed to act even though it was clearly and unequivocally pointed out to them by the Superintendent that this was the procedure to be followed in opposing the motion for summary judgment. (See excerpt from Opposition to Plaintiffs' Motion for Order Granting Discovery, pages 4a and 5a of the appendix attached to this opposition.) In the instant proceedings Petitioners cannot claim ignorance of the procedural prerequisites with which they should have complied but chose to ignore.

The fact is that Petitioners *never supplemented either their motion or their discovery requests*. In the instant case the summary judgment motion was served on Petitioners on November 14, 1990. The district court's order granting summary judgment was filed on July 8, 1991, and entered on July 12, 1991. During the approximately eight months

that the summary judgment motion was pending, Petitioners failed to move to obtain the accounting records of the Bank from the FDIC as required by rule 56(f) for the purpose of opposing the summary judgment motion.

By itself, Petitioners' failure to file a motion under rule 56(f) would be sufficient to support the summary judgment against petitioners' belated complaints regarding discovery *Paddington Partners v. Bouchard*, 34 F.3d 1132 (2d Cir. 1994). But that failure is only one of Petitioners' failures even to attempt to preserve the rights they now assert. Petitioners did not in any way try to gain access to the Bank's records which were in the custody of the FDIC; nor did they file a motion to obtain additional time (in addition to the eight months between receipt of the summary judgment motion and its ultimate disposition) in which to obtain discovery of the accounting records of the Bank; nor did they file any affidavit purporting to describe any efforts that were made to obtain the accounting records of the Bank. Finally, Petitioners remained silent when the district court inquired as to whether the court should proceed to decide the summary judgment motion before considering Petitioners' discovery motion.

The record demonstrates that Petitioners slept on their rights. Accordingly, the district court did not abuse its discretion in proceeding to hear and decide the summary judgment motion.

III.

PETITIONERS WERE ACCORDED A HEARING ON THE MERITS AS REQUIRED BY THE CALIFORNIA FINANCIAL CODE AND DUE PROCESS OF LAW

Petitioners assert (Petition, page 19) that the granting of the summary judgment motion denied Petitioners a post-deprivation hearing "on the merits" which would otherwise have been provided to them under the provisions of section 3101 of the California Financial Code. Section 3101 provides for a review by the Superior Court of the Superintendent's decision to take possession of the property and business of the Bank. The statute states in relevant part, "The court . . . after a hearing and a determination of the facts upon the merits may dismiss . . . " In this case there were two district court hearings with extensive briefing, declarations and oral arguments in which the court examined the facts presented and upon the merits entered judgment. These were hearings of the type called for in the language of the statute.

In an apparent attempt to pique the interest of this Court in reviewing the proceedings before the lower courts in this matter, Petitioners sprinkle among their arguments discussion and citations related to the standard of review and scope of hearing applicable to evidentiary hearings in financial institution closure challenges. They suggest that there is disagreement among the cases which have addressed these standard and scope issues.

Some district courts may disagree as to what scope of hearing is required in contexts other than the context of this case, but Petitioners have presented no court decision at any level which conflicts with the holding of the Ninth

Circuit Court of Appeals in this case. (See discussion *supra* at pages 11-12 and note 5.) The issues presented in the cases relied upon by Petitioners are simply not relevant to the instant case. If the summary judgment procedure followed in this case by the district court and affirmed by the Ninth Circuit Court of Appeals satisfies the constitutional due process requirements, as the Superintendent vigorously asserts that it does, issues related to an evidentiary hearing never arise.

Ever since the decision in *Fidelity Deposit Co. of Maryland v. U.S.*, 187 U.S. 315 (1902), 23 S.Ct. 120, 122, 47 L.Ed. 194, 197-98, it has been and continues to be the law that summary judgment does not violate the non-moving party's right to trial by jury in cases that would otherwise fall within that guarantee. All the more so here, where the statutory right is only to a hearing before a judge. (See also, Wright, Miller & Kane, *Federal Practice and Procedure*, Civil 2d § 2714 and cases cited.)

In the instant proceedings the evidence before the district court established that the Bank's contributed capital was statutorily impaired. In *Biscayne Fed. S. & L. v. Federal Home Loan Bank Bd.*, 720 F.2d 1499, 1505 (11th Cir. 1983), the court held that once the statutory grounds for receivership have been found to exist ". . . judicial inquiry ends!". In the instant case the district court examined the declarations and evidence before it and determined that a statutory ground for closure existed based on the Bank's own records. There was, therefore, no need for the district court to hear any additional evidence regarding the millions of dollars in required loan writedowns and other adjustments to over-valued assets carried on the books of the Bank which would show that the Bank's contributed

capital was impaired to a far greater extent than that shown on its own books. Petitioners were thus afforded the " . . . hearing and a determination of the facts upon the merits . . . " required by California Financial Code section 3101.

This Court in *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970), articulated the standard for due process when it stated: " 'The fundamental requisite of due process of law is the opportunity to be heard.' [citation]." In *Woods v. Federal Home Loan Bank Bd.*, 826 F.2d 1400, 1410-1413 (5th Cir. 1987), cert. denied, 485 U.S. 959 (1988), the court examined and rejected the same type of due process arguments as are advanced by Petitioners in this case. Here, Petitioners were given notice and accorded the opportunity to be heard and present all arguments bearing upon the issues raised in the summary judgment motion in two separate hearings. The result in the instant case was determined by the deficiencies in the Bank's financial condition as shown by its own records rather than due to any defect in the hearing process accorded to Petitioners. The district court reviewed the evidence presented and determined, in accordance with the summary judgment standards set forth in *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986), that Petitioners had failed to meet the burden of showing that a fair minded jury could return a verdict in favor of Petitioners on the evidence presented.[6] The Ninth Circuit

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[6] The Superintendent disagrees with Petitioners' contention (Petition, page 8) that various declarations from the Bank demonstrated that there were genuine factual issues regarding whether the Bank's contributed capital was impaired. As noted by the Ninth Circuit in its opinion (Petition, page 8a) "Nowhere in those declarations, however, is there a statement that including loan loss reserves and deferred fees in deficit retained

Court of Appeals properly determined that summary judgment against Petitioners was fully appropriate under the particular context of this case. It follows that the Petition for Certiorari should be denied in this case.

CONCLUSION

Conrad W. Hewitt, current successor to James E. Gilleran, the California Superintendent of Banks, and the California State Banking Department pray that this Court deny First Pacific Bank and First Pacific Bancorp, Inc.'s Petition for Writ of Certiorari, because the case presents no issue appropriate for the Court's review, and because the lower courts' holdings were not in error.

Respectfully submitted,

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earnings is consistent with GAAP [Generally Accepted Accounting Principles]," as is required by section 118 of the California Financial Code.

Rule 56. Summary Judgment

(a) **For Claimant.** A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) **For Defending Party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) **Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) **Case Not Fully Adjudicated on Motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining

the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of Affidavits; Further Testimony; Defense Required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) **When Affidavits are Unavailable.** Should it appear from the affidavits of a party opposing the motion

that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits Made in Bad Faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FIRST PACIFIC BANK, a California corporation, and FIRST PACIFIC BANCORP, INC., a Delaware corporation, Plaintiffs, v. JAMES E. GILLERAN, SUPERINTENDENT OF BANKS, CALIFORNIA STATE BANKING DEPARTMENT; THE FEDERAL DEPOSIT INSURANCE CORPORATION, IN ITS CAPACITY AS RECEIVER OF FIRST PACIFIC BANK and DOES 2 through 25, inclusive, Defendants.	CASE NO. CV 90-6563-JGD(JRX) OPPOSITION OF DEFENDANTS JAMES E. GILLERAN SUPERINTENDENT OF BANKS AND CALIFORNIA STATE BANKING DEPARTMENT TO PLAINTIFFS' MOTION FOR ORDER GRANTING DISCOVERY DATE: April 22, 1991 TIME: 2:30 p.m. COURTROOM: 15 [Assigned to Judge Davies]

* * *

[p. 4] The plaintiffs also argue that they are entitled to discovery in order to oppose the Superintendent's motion for summary judgment. This case is governed by state substantive law. In the State court, where this matter originated, under Cal. Code of Civ. Proc. § 437(c), the plaintiffs must first submit a sworn statement explaining to the court why specific facts essential to opposing the motion cannot be presented. The same is true in this forum under the provisions of Fed. Rules of Civ. Proc. 56 (e) and (f) which require the plaintiffs in affidavit form to:

- explain what facts are sought in relation to the issue presented in the summary judgment motion;
- explain how the facts sought are essential to opposing the motion;
- set forth the efforts that have previously been made to secure the facts;
- set forth the reasons why the facts they seek are not readily available.

In the instant case what the plaintiffs must address is their Statement of Condition from their own ledgers which state the financial condition of the bank. The Statements of Condition which are before the court in support of the defendant's summary judgment motion are *the Bank's own Statements of Condition* as created from records maintained by Bank *without* any write-downs by the Superintendent. Based on the Bank's own documentation, the Bank's contributed capital was statutorily impaired, and a criterion for the Superintendent's issuance of the Order of Taking Possession of Property and Business and Order for . . .

* * *